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IN THE

Supreme Court of The United States

Term, 1973

No. 73-790

RICHARD K. LEAS, *Petitioner,*

v.

KENNETH E. SHERER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioner, Richard K. Leas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 17, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals and the opinion of the United States District Court for the Southern District of Indiana appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 17, 1973. A timely petition for rehearing was denied on August 21, 1973, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. §1254(1).

QUESTION PRESENTED

Can 14th Amendment right of hearing or trial be denied in an action which is outlawed by statutory limitation before it can be known to exist?

STATUTORY PROVISIONS INVOLVED

Acts of the General Assembly 1941 Ch. 116, §1 p. 328 Burns Ind. Statutes Vol. 2 (1967 Replacement) §2-627

> "Malpractice—Limitation of actions.—No action of any kind for damages, whether brought in contract or tort, based upon professional services rendered or which should have been rendered, shall be brought, commenced or maintained, in any of the courts of this state against physicians, dentists, surgeons, hospitals, sanitariums, or others, unless said action is filed within two (2) years from the date of the act, omission or neglect complaint of".

STATEMENT OF THE CASE

The respondent, Kenneth E. Sherer, a surgeon, left a hemostat in the plaintiff's abdomen on September 7, 1966, which was not discovered until after the two-year Indiana statute of limitations expired. This action was filed within two years of the discovery of the hemostat, and the plaintiff could not have commenced his action before it was outlawed by the Indiana statute of limitations because

he admittedly could not have known of the presence of the hemostat in his abdomen until it was too late. The petitioner contends that this statute is in violation of the 14th Amendment of the United States Constitution because it completely deprives him of his right of action without any prior notice or hearing.

The basis for Federal jurisdiction of the United States District Court for the Southern District of Indiana, the Court of first instance, was diversity of citizenship under Title 28, U. S. Code, Section 1332.

REASON FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The respondent, Kenneth E. Sherer, a surgeon, left a hemostat in the plaintiff's abdomen on September 7, 1966, which was not discovered until after the two-year Indiana statute of limitations expired. This action was filed within two years of the discovery of the hemostat, and the plaintiff could not have commenced his action before it was outlawed by the Indiana statute of limitations because he could not have known of the presence of the hemostat in his abdomen until it was too late. The petitioner contends that this statute is unconstitutional in violation of the 14th Amendment of the United States Constitution because he has been denied due process of law in that he has been deprived of his cause of action without notice, and without any hearing or trial.

The 1941 Acts of the General Assembly Ch. 116, §1 p. 328 and Burns Ind. Statutes Vol. 2 (1967 Replacement)

§2-627 provides that no action for damages based on professional services rendered shall be brought unless the action is filed within two years from the date of the act, omission, or neglect complained of.

The Constitution of the United States Amendment 14 Section 1 provides:

> "Citizenship—Due process of law—Equal protection.
>
> • • •
>
> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Indiana statute in question effectively denies the petitioner a remedy in due course of law as guaranteed by the Constitution of the United States Amendment 14, Section 1.

Due process requires a hearing at a meaningful time, and requires that the right to a hearing must be granted at a time when the deprivation can still be prevented. In *Fuentes v. Shevin* (1972) 407 U. S. 67, 32 Law. Ed. 2nd 556, 92 Supreme Ct., 1983, a replevin statute was held to be in violation of Amendment 14. Section 1, of the Constitution of the United States where creditors were allowed to secure writs of seizure before notice to the debtor, and before hearing of any kind, by posting a bond with the clerk before notice. Mr. Justice Stewart, speaking for the court, said that the replevin statutes "work a deprivation of property without due process of law insofar as they denied the right to a prior opportunity to be heard before the chattels are taken from their possessor".

The primary question, this court said, ". . . is whether these state statutes are constitutionally defective in failing to provide hearings 'at a meaningful' time". This court went on to say, "The right to notice, and a hearing must be granted at a time when the deprivation can still be prevented".

The Indians statute in question, and others like it in the United States, afford no hearing at a meaningful time, or at any time when the deprivation of the plaintiff's rights can still be prevented.

All of this was the principal question raised by the plaintiff on appeal to the United States Court of Appeals, Seventh Circuit. The opinion of that court did not discuss, mention, or decide this question.

The conflict of the statute in question with Amendment 14, Section 1 of the United States Constitution justifies the granting of certiorari to review the judgment below.

CONCLUSION

For these reasons a Writ of Certiorari should be issued to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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